

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: CATHODE RAY TUBE (CRT)) MDL No. 1917
ANTITRUST LITIGATION)
) Case No. C-07-5944-SC
)
This Order Relates To:) ORDER SETTING HEARING FOR
) OBJECTIONS TO APPOINTMENT
) OF SPECIAL MASTER
)
ALL ACTIONS)
)

The Court has received objections to the appointment of U.S. Magistrate Judge (Ret.) James Larson ("Judge Larson") as a Special Master to hear those motions before the Court as described at the Status Conference held on August 7, 2015. See ECF No. 4021; see also ECF No. 3986; Fed. R. Civ. P. 53(a)(1)(C).

The Court is not in the habit of releasing preliminary rulings. However, to ensure parties can address the concerns of the Court at a hearing the Court will order herein, the Court makes a rare exception and discloses that it leans toward a finding that the marital relationship of the proposed Special Master to Judge Illston is irrelevant.

Judge Larson is an honest, reliable, and trustworthy individual whose many years of service to the Court give the Court great confidence in his ability to be fair and impartial when considering judicial opinions authored by his spouse. The Court is

1 equally confident that he will use his own resources when making
2 decisions, and will consider the need for an order that he not be
3 permitted to discuss the substance of this case with his wife until
4 after this case is done.

5 Insofar as parties cite 28 U.S.C. § 455, the Court is inclined
6 to find that the precedent supports this appointment. Section 455,
7 Subsection (a) states in relevant part that: "Any justice, judge,
8 or magistrate of the United States shall disqualify himself in any
9 proceeding in which his impartiality might reasonably be
10 questioned." The United States Supreme Court has clarified that
11 the goal of this subsection is to "avoid even the appearance of
12 partiality. If it would appear to a reasonable person that a judge
13 has knowledge of facts that would give him an interest in the
14 litigation then an appearance of partiality is created even though
15 no actual partiality exists. . . ." Liljeberg v. Health Servs.
16 Acquisition Corp., 486 U.S. 847, 860 (1988). The test, as
17 reformulated by the Ninth Circuit, has been:

18 "'whether a reasonable person with knowledge of all
19 the facts would conclude that the judge's impartiality
20 might reasonably be questioned.'" Herrington v.
21 County of Sonoma, 834 F.2d 1488, 1502 (9th Cir. 1987)
22 (quoting United States v. Nelson, 718 F.2d 315, 321
23 (9th Cir. 1983)). "Section 455(a) asks whether a
24 reasonable person perceives a significant risk that
the judge will resolve the case on a basis other than
25 the merits." In re Mason, 916 F.2d 384, 385 (7th Cir.
1990). The "reasonable person" in this context means
a "well-informed, thoughtful observer," as opposed to
a "hypersensitive or unduly suspicious person." Id.
at 386.

26 In determining whether disqualification is
27 warranted under § 455(a), we also apply the general
rule that questions about a judge's impartiality must
28 stem from "extrajudicial" factors, Liteky v. United
States, 510 U.S. 540, 554[] (1994), that is, from

sources other than the judicial proceeding at hand.
1 Pau v. Yosemite Park and Curry Co., 928 F.2d 880, 885
2 (9th Cir. 1991) (citing Toth v. Trans World Airlines,
3 862 F.2d 1381, 1388 (9th Cir. 1988)).

4 We are also mindful "that section 455(a) claims
5 are fact driven, and as a result, the analysis of a
6 particular section 455(a) claim must be guided, not by
7 comparison to similar situations addressed by prior
8 jurisprudence, but rather by an independent
9 examination of the unique facts and circumstances of
10 the particular claim at issue." United States v.
11 Bremers, 195 F.3d 221, 226 (5th Cir. 1999).

12 Clemens v. U.S. Dist. Court for Cent. Dist. of Cal., 428 F.3d 1175,
13 1178 (9th Cir. 2005). Clemens also cited approvingly the list by
14 the Tenth Circuit in Nichols v. Alley, 71 F.3d 347, 351 (10th Cir.
15 1995). See Clemens, 428 F.3d at 1178-79.

16 As applied, the Ninth Circuit has clarified that many
17 instances do not rise to a level requiring recusal. See S.E.C. v.
18 ING USA Annuity & Life Ins. Co., 360 F. App'x 826, 828 (9th Cir.
19 2009) ("There is no authority for the proposition that judges must
20 recuse themselves if they served as mediators in a related
21 proceeding."); Clemens, 428 F.3d at 1179-80 (all the Federal Judges
22 in a judicial district did not need to be recused after collective
23 death threats); Jorgensen v. Cassiday, 320 F.3d 906, 911-12 (9th
24 Cir. 2003) (where a former law clerk who finished working for a
25 judge eight years ago threatened to use his influence to guarantee
26 a favorable judgment, the judge did not have to recuse himself);
27 Cordoza v. Pac. States Steel Corp., 320 F.3d 989, 998-1001 (9th
28 Cir. 2003) (Judge Patel did not need to recuse herself when
 pursuing her administrative role as an enforcer of the behavior and
 standards for an already appointed special master). Simple
 "conclusions and opinions" are also insufficient allegations of

1 prejudice. Keyter v. Locke, 182 F. App'x 684, 685-86 (9th Cir.
2 2006).

3 Here, two cases are particularly instructive. See In re
4 Smith, 317 F.3d 918, 933-34 (9th Cir. 2002); Perry v.
5 Schwarzenegger, 630 F.3d 909, 915-16 (9th Cir. 2011). In Smith,
6 the Ninth Circuit established that:

7 First, judicial rulings alone almost never constitute
8 a valid basis for a bias or partiality motion
9 Second, opinions formed by the judge on the basis of
10 facts introduced or events occurring in the course of
11 the current proceedings, or of prior proceedings, do
not constitute a basis for a bias or partiality motion
unless they display a deep-seated favoritism or
antagonism that would make fair judgment impossible.

12 Id. at 933 (quoting Liteky, 510 U.S. at 555) (emphasis in
13 original). Rather, expression of opinions only require recusal
14 where they "reveal such a high degree of favoritism or antagonism
15 as to make fair judgment impossible." Id. (quoting Liteky, 510
16 U.S. at 555). Based on this understanding of Liteky, the Ninth
17 Circuit in Smith found that an opinion from a prior proceeding can
18 only be a basis for recusal where the opinions display "a deep-
19 seated favoritism or antagonism." Id. (internal citation omitted).
20 Thus, the predisposition of the judge in Smith to approve a
21 settlement with modification did not show any bias, and the fact
22 that the inclination did not change through many hearings was
23 insufficient "to indicate that it was impossible for [that judge]
24 to change his mind." Id. Even adverse rulings did not rise to the
25 level of the "deep-seated antagonism or favoritism [required] to
26 render a fair judgment impossible." Id. Smith thus held that
27 "[e]ven if Judge Jones clung to his opinion, a little stubbornness
28 is not ordinarily grounds for disqualification." Id. at 934.

1 In Perry, the Ninth Circuit examined an instance where a Judge
2 did not recuse himself in spite of very public statements and
3 actions by his wife that were directly on point. See Perry, 630
4 F.3d at 914-16. There, the judge reasoned that his "recusal under
5 § 455(a) would still be appropriate only if a reasonable person
6 with knowledge of all the facts would reasonably believe that, by
7 virtue of [his] marriage, [he] might approach and decide this case
8 differently than [he] would have otherwise approached and decided
9 it." Id. at 914 (citations omitted). Perry then catalogued how
10 the judge's wife had no interest in the outcome of the case (beyond
11 that of any American interested in that type of case), and how even
12 though the judge's wife headed (part of) an organization (the ACLU)
13 with an interest in that case, the ACLU had no filings before the
14 court and thus had nothing to gain. Id. at 914-915. The court
15 then expressly considered that even though the views of the judge's
16 wife or those of the ACLU may come before the court,

17 "[the judge's wife] is an independent person who need
18 not obtain [her husband's] approval or agreement to
advocate for whatever social causes she chooses. The
19 views are hers, not [her husband's], and [the judge
does] not in any way condition [his] opinions on the
positions she takes regarding any issues."

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21 Id. at 916. Therefore, the panel reasoned that a reasonable person
22 who truly knew all the facts would not believe the judge would be
23 partial or biased due to his wife's views on social policy,
24 "whether those views are publicly expressed and advocated for, or
25 not, and whether advocated for by her in her private capacity or in
26 her capacity as head of the ACLU/SC." Id. The court also cited
27 that the judge in that case had been a jurist for 30 years, and any
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1 person familiar with his record would not reasonably believe that
2 beliefs of his wife would bias him. See id.

3 Here, the Court's sense is that certain parties are concerned
4 that Judge Larson, after 14 years of federal service, will be
5 swayed by the written opinions of his wife Judge Susan Illston, a
6 Federal, Article III Judge of 20 years. These same parties seem
7 concerned that Judge Larson will give greater weight or deference
8 to decisions by Judge Illston. Yet Smith clearly teaches that
9 former judicial decisions do not yield bias absent a deep-seated
10 favoritism or antagonism which is clearly lacking in this case.
11 And Perry stands for the proposition that a spouse's personal or
12 professional opinions do not always yield bias to a federal judge
13 such that recusal is required. The concerned parties offer merely
14 "conclusions and opinions," and thus fail to offer a sufficient
15 allegation of bias. Keyter, 182 F. App'x at 685-86.

16 The Court recognizes the key difference from Perry that
17 certain parties would no doubt cite -- that unlike the judge in
18 Perry, Judge Larson would be forced to evaluate the judicial
19 opinions decided by his wife. True, it may be awkward for parties
20 to argue to Judge Larson that he should reach a finding contrary to
21 that of his wife, or for Judge Larson to hear such arguments. But
22 under Section 455 this justifies only permissible rather than
23 mandatory recusal. Critically, Judge Illston has nothing to gain
24 or lose from her husband's conclusions -- even if Judge Larson were
25 to uniformly agree or uniformly disagree with Judge Illston, Judge
26 Illston would be no better off, no worse off, and no more or less
27 likely to be upheld or reversed on appeal. Armed with that simple
28 knowledge, any reasonable person familiar with the circumstances --

1 to include Judge Larson's judicial record and that of his spouse --
2 would not hesitate to affirm that the decisions Judge Larson will
3 reach will be fair, equitable, and will in no way grant any
4 improper deference to the work product of his spouse. Therefore,
5 the Court is inclined to overrule the pending objection.

6 To ensure adequate opportunity to be heard, the Court hereby
7 ORDERS that there be a hearing at which interested parties may
8 appear before the Court. See Fed. R. Civ. P. 53(b)(1). Parties
9 are not required to attend if they do not wish to be heard further
10 on this matter. The hearing will be Friday morning, September 11,
11 2015, at 10:00 am, at the San Francisco Courthouse, 17th Floor,
12 Courtroom 1.

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14 IT IS SO ORDERED.

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16 Dated: August 31, 2015


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UNITED STATES DISTRICT JUDGE